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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND,
d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court's memorandum order is unreported. It appears in the Appendix in the Petition for Writ of Certiorari, at Page A1 (hereinafter referred to as the "Petition Appendix", to distinguish it from the separate Appendix filed herewith).

The first opinion of the Court of Appeals, the per curiam panel opinion, is reported at 588 F.2d 124, and appears in the Petition Appendix at Page A5. The opinion of the Court of Appeals on rehearing en banc is reported at 604 F.2d 976 and appears in the Petition Appendix at Page A11.

JURISDICTION

The judgment of the Court of Appeals on rehearing en banc was entered on October 22, 1979, and appears in the Petition Appendix at A41. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis (Petitioner herein) appears in the Petition Appendix at Page A43. The Petition for Writ of Certiorari was filed on February 1, 1980, and granted on March 24, 1980. The jurisdiction of this Court rests upon 28 United States Code, Section 1254(1).

STATUTE INVOLVED

The federal statute involved is Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity.

STATEMENT

In the District Court below, the Respondents allege that a Texas state district court judge, O. P. Carrillo, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and Petitioner, Orville E. Dennis, to deprive Respondents of their civil rights. The complaint for damages was brought under 42 United States Code, Section 1983 (hereinafter referred to as "Section 1983").

In the Respondents' "First Amended Complaint" (A. 6), the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Respondents in state district court to wrongfully enjoin the Respondents from certain activity on an oil and gas lease, the judge's entry of a temporary injunction, and Martens' and Petitioner's signing as individual sureties on the bond required under state law for issuance of the temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.).

The only allegations contained in the First Amended Complaint as to Petitioner are the conclusory allegation that Petitioner "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to

wrongfully injure the Respondents, and that Petitioner had participated in that conspiracy by signing the temporary injunction bond as an individual surety.

The District Court below, on motions to dismiss submitted by Petitioner and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under Section 1983 (see Petition Appendix, A1).

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Respondents would not have suffered the alleged injury.

Assuming the allegations in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against the Petitioner and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth Circuit,

the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including Petitioner (see Petition Appendix, A5). In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to Section 1983 cases.

With respect to the private citizen defendants, including this Petitioner, the Fifth Circuit Panel held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed. However, on March 9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Petitioner and the other parties of its intent to reconsider en banc the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to footnote number 13 in the opinion of this Court in *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to

the private alleged co-conspirators (Petition Appendix, A11).

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite action under color of state law. Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

Judgment on Rehearing en Banc was entered on October 22, 1979, affirming the dismissal of the judge, but reversing and remanding as to Petitioner and the other private citizen "conspirators" (Petition Appendix, A41). This Petitioner filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979 (Petition Appendix, A43). Upon Petitioner's motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

The Petition for Writ of Certiorari was filed on February 1, 1980, and granted by this Court on March 24, 1980.

SUMMARY OF ARGUMENT

Judicial immunity involves more than a judge's immunity from liability for civil damages. The doctrine of judicial immunity requires that a judge be protected from apprehension of any personal consequences. The purpose

of the doctrine is to further the public interest in a free and independent judiciary.

The decision by the majority of the court of appeals below erodes the doctrine of judicial immunity. By permitting prosecution of claims under Section 1983 against private individuals who have allegedly conspired with a judge, the court of appeals exposes judges indirectly to the harms sought to be avoided by the doctrine of judicial immunity.

It is Petitioner's position that the opinion of the majority of the court of appeals below is contrary to the public interest sought to be furthered by the doctrine of judicial immunity as applied by this court in Section 1983 cases. Furthermore, the decision below conflicts with the established rule followed by a majority of the circuit courts of appeals which have considered the issue, and that the majority rule furthers the public interest, whereas the minority rule followed by the court below frustrates that public interest.

I.

INTRODUCTION

Narrowly stated, the question presented for review is whether the scope of the doctrine of judicial immunity is limited to shielding judges from personal liability for damage claims, or whether the doctrine has a broader purpose of shielding judges altogether from the threat of involvement, whether direct or indirect, in litigation brought by unsatisfied litigants. The decision of the court of appeals below restricts the scope of judicial immunity, and would allow to occur indirectly most of the harms sought to be avoided by the doctrine of judicial immunity.

II.

PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

At least since *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), this Court has recognized that the public interest is best served by protecting judges from lawsuits complaining of their judicial decisions. The purpose of judicial immunity is to enable judges to function without being subjected to personal consequences. The public interest to be served by judicial immunity is to allow a judge the freedom to act upon his own convictions and without compromising his judicial independence. The doctrine of judicial immunity is intended to do more than merely immunize a judge from personal liability for money damages.

III.

THE DOCTRINE IS NOT QUALIFIED BY THE JUDGE'S MOTIVES.

Equally well established within the doctrine of judicial immunity is that the scope of judicial immunity is intended to encompass even judicial acts motivated by malice and corruption. The applicability of judicial immunity should not depend upon the judge's motives behind his judicial acts.

IV.

APPLICABILITY OF THE DOCTRINE DEPENDS UPON EXISTENCE OF JURISDICTION.

Also established is that the doctrine applies only where the judge has acted within his jurisdiction and not in

clear absence of any jurisdiction. It is uncontroverted that the subject judge, Carrillo, was acting within his state court jurisdiction when he entered the temporary injunction about which the Respondents complain.

V.

THE DOCTRINE IS APPLICABLE TO SECTION 1983 CASES.

In enacting Section 1983, Congress did not intend to abolish all common law immunities. This Court has held that the doctrine of judicial immunity, as well as that of legislative immunity, is applicable in Section 1983 cases.

VI.

SECTION 1983 AND PRIVATE PERSONS.

A complaint under Section 1983 can be maintained against private persons only in the event it can be shown that those persons conspired with a state official in achieving the injury of which the Plaintiffs complain. Without the state official, no cause of action exists under Section 1983 against private persons.

VII.

A JUDGE IS NOT A "PERSON" UNDER SECTION 1983.

The implication from this Court's holdings in *Pierson v. Ray,* 386 U.S. 547 (1967) and *Stump v. Sparkman,* 435 U.S. 349 (1978) is that, because of the applicability of the doctrine of judicial immunity, a judge acting

within his jurisdiction is not a "person" as that term is used in Section 1983. Therefore, any private individuals who are alleged to have conspired with that judge are likewise excluded from the ambit of Section 1983 because they did not conspire with a "person" against whom a valid claim could be stated under Section 1983.

VIII.

THE MAJORITY RULE IN THE CIRCUIT COURTS.

The majority of the courts of appeals which have considered the issue presented is that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity.

IX.

THE MINORITY RULE IN THE CIRCUIT COURTS.

Until the lower court changed its position, the only other circuit to deviate from the majority rule was the First Circuit in *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976). Perhaps the Seventh Circuit deviated from the majority rule last year in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). However, this is questionable because of the highly fractioned en banc opinion. The *Kermit* decision is distinguishable from the instant case because it did not involve a judge as a conspirator, and the court in *Kermit* relied upon other case authority which also did not involve a judge as a conspirator.

X.

EROSION OF THE DOCTRINE BY COLLATERAL ATTACK.

The opinion of the majority of the court of appeals below challenges the public policy behind the doctrine of judicial immunity. The court below would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages. However, the scope of the doctrine, as described by this Court in its opinion in *Bradley, Pierson* and *Stump* is much broader than that. The purpose of the doctrine is to ensure a judge's freedom from apprehension of personal consequences to himself in exercising his authority as a judge within his jurisdiction. The purpose behind the doctrine requires that collateral attack, focusing on the judge's judicial role, also be avoided. Any other result would compromise the absoluteness of the doctrine of judicial immunity.

XI.

BALANCING THE RELATIVE HARMS.

The Respondents have state court remedies against the Petitioner and the other alleged private co-conspirators. To permit the Respondents to pursue Petitioner and the other private alleged co-conspirators under a Section 1983 claim in federal court is to allow the Respondents a cumulative remedy, at the expense of the doctrine of judicial immunity.

By allowing the prosecution of a Section 1983 claim against the private alleged co-conspirators only, the court below has necessarily insured the involvement of the

judge, whether direct or indirect. To establish their complaint under Section 1983, the Respondents must plead and prove that the judge participated in the conspiracy and that his motives were non-judicial. The existence of the lawsuit provides the intimidation and harassment sought to be avoided by the doctrine of judicial immunity.

The judge becomes a principal witness in the Section 1983 lawsuit against the private alleged co-conspirators. The judge is subjected to discovery procedures and pretrial practices. He may even have to testify and be required to explain his conduct, motives and sincerity to another judge and jury.

This involvement of the judge, whether as a witness or collaterally by his action being made the focus of the case, calls into question his integrity as a judge. The judge may be forced to waive his immunity and enter the case voluntarily in order to defend himself, his honor and his integrity.

It is not in the public interest that a remedy be provided in federal court for any litigant dissatisfied with the result of litigation in a state court, by merely alleging a conspiracy sufficient to obtain federal court review of his claim.

The ability to prosecute a Section 1983 claim against a private person because of his involvement with a judge in a judicial proceeding can only discourage and penalize private persons for seeking the aid or judicial approval of a court.

The past and present experiences of the federal court demonstrate the willingness of litigants, "jailhouse law-

yers" and others to challenge the motives of their judges through filing Section 1983 lawsuits in federal court.

On balance, the public interest is best served by preserving intact an absolute doctrine of judicial immunity—absolute in the sense of barring suit directly against the judge, and absolute in the sense of barring suit against private persons where the alleged injury stems from a judge's judicial act within his jurisdiction.

ARGUMENT

I.

INTRODUCTION

Presented here is an issue of law involving one aspect of the doctrine of judicial immunity in Section 1983 cases. Is the scope of the doctrine limited to shielding judges from personal liability for damage claims? Or, is the doctrine intended to shield judges altogether from the threat of involvement, whether direct or indirect, in litigation brought by unsatisfied litigants?

It is suggested that the interest of the public is best served if the doctrine of judicial immunity avoids any involvement of a judge in any litigation under Section 1983 which questions the judge's motives. If the doctrine is intended to serve this broader purpose, then the decision of the court of appeals would erode the efficacy of the doctrine. By its decision on rehearing en banc, the court of appeals would allow to occur indirectly most of the harms sought to be avoided by the doctrine of judicial immunity.

II.

PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

It was long ago recognized by this Court that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). This landmark decision emphasized that the concept of judicial immunity is important to preserve our system of jurisprudence. It is imperative that judges be immune from prosecution for their acts as judges. This Court emphasized in *Bradley v. Fisher, supra,* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher,* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley*

noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L.Ed. at 640.

Moreover, in this Court's landmark decision in *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), this Court reiterated and reaffirmed its recognition of the importance of the doctrine of judicial immunity. This Court stated:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray,* 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

Furthermore, this Court recently reaffirmed its recognition of the importance of judicial immunity in *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). Simply stated, this Court has consistently upheld the doctrine of judicial immunity and has given it effect in the cases involving the issue.

The Circuit Courts of Appeals recognize the importance and applicability of the doctrine of judicial immunity. These Circuit Courts of Appeals emphasize that judges are absolutely immune to civil damage suits for judicial

acts done within their jurisdiction. *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975); *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109; *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. reh. den. 98 S.Ct. 1289; *Brown v. Dunne,* 400 F.2d 341 (7th Cir. 1969); *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975); *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974); *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965); *Franklin v. Meredith,* 386 F.2d 958 (10th Cir. 1967). The Ninth Circuit Court of Appeals in *Gregory v. Thompson, supra,* appropriately described the judicial system's consistent recognition of the doctrine of judicial immunity when it said that the doctrine is "a seemingly impregnable fortress in American jurisprudence . . ." *Gregory v. Thompson,* 500 F.2d at 62.

It appears that the doctrine of judicial immunity is essential for the proper administration of justice and the consistent adherence to such a principle bears out its importance.

III.

THE DOCTRINE IS NOT QUALIFIED BY THE JUDGE'S MOTIVES.

Applicability of judicial immunity is not determined by the judge's motives behind his judicial acts. The scope of judicial immunity is intended to encompass even judicial acts motivated by malice and corruption. In *Bradley v. Fisher, supra,* this Court explicitly stated that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such

acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall. at 351, 20 L.Ed. at 651.

In *Pierson v. Ray, supra,* this Court again explained that judicial immunity applies even if a judge is accused of acting corruptly. This Court said that:

> "This immunity applies even where the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554, 18 L.Ed.2d at 294.

Moreover, in *Stump v. Sparkman, supra,* this Court clearly explained that a judge will not be deprived of immunity because the action he took was done maliciously. In discussing the inclusion of malice and corruption within the scope of judicial immunity, this Court stated in *Stump v. Sparkman* that:

> "Even earlier, in *Randall v. Brigham,* 7 Wall 523, 19 L.Ed. 285 (1869), the Court stated that judges are not responsible 'to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.' Id. at 537, 19 L.Ed. 285. In *Bradley* the Court reconsidered that earlier statement and concluded that 'the qualifying words used were not necessary to a correct statement of law . . .' *Bradley v. Fisher,* 13 Wall 335, 351, 20 L.Ed. 646 (1872)." 435 U.S. at 355, 55 L.Ed.2d at 338, footnote 5.

In an opinion subsequent to that in *Stump,* this Court reiterated that to insure the public interest in a fearless judiciary is served, the doctrine immunizes judges from civil lawsuits concerning the motives behind their decisions. *Butz v. Economou,* 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978).

IV.

APPLICABILITY OF THE DOCTRINE DEPENDS UPON THE EXISTENCE OF JURISDICTION.

As a general statement about the doctrine of judicial immunity, for the doctrine to apply, the judge must have acted within his jurisdiction and not in clear absence of any jurisdiction. *Stump,* 435 U.S. at 356-357. A distinction should be made here between an act "in excess of jurisdiction" and an act "in clear absence of all jurisdiction." Judges are immune from suit for judicial acts done within or "in excess of" their jurisdiction, even if those acts have been done maliciously or corruptly. *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974).

It is uncontroverted that the defendant trial judge acted within his state court jurisdiction. In their First Amended Complaint, the Respondents assert that "the recovery of 13,000 barrels of crude oil was lost as a result of the temporary injunction, since other operators producing oil from the same reservoir were not similarly enjoined." It is clear that Respondents' complaints are directed toward the order signed by Judge Carrillo, temporarily enjoining production of oil from land leased in Duval County. Even if erroneous, Carrillo's act in entering this judgment was a judicial act. The order could not have been entered in any other capacity other than in Carrillo's judicial capacity.

In *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), the Texas appellate court, in reviewing Carrillo's actions in granting the temporary injunction, held that he "abused his direction." 519 S.W.2d at 224. The Texas Court did not hold that Carrillo was without jurisdiction.

In order to exercise discretion, a judge would have to have jurisdiction over the parties and subject matter and be able to enter the order which he did. Therefore, Carrillo's act in entering the order granting the temporary injunction was not "in absence of all jurisdiction."

Without such order or act (the injunction) Respondents would not have sustained the "alleged" injury nor would there be anything of which to complain. Therefore, the injurious act complained of was a judicial act, clearly done in Judge Carrillo's judicial capacity and within the Judge's jurisdiction. His subject conduct falls within the scope of judicial immunity. The court of appeals below correctly held that the judge was immune from the Section 1983 complaint.

V.

THE DOCTRINE IS APPLICABLE TO SECTION 1983 CASES.

This Court has concluded that the legislative record for Section 1983 gives no clear indication that Congress meant to abolish all common-law immunities. In *Tenney v. Brandhove,* 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951), this Court held that legislative immunity was applicable in Section 1983 cases. In *Pierson,* it held

that the doctrine of judicial immunity is applicable in Section 1983 cases. *Pierson, supra,* 386 U.S. at 554-555; *Stump, supra,* 435 U.S. at 356.

VI.

SECTION 1983 AND PRIVATE PERSONS.

How can Section 1983 apply to private persons, like Petitioner, when the state actor is immune?

Section 1983 makes no mention about private persons acting alone, nor about conspiracies between private citizens and state officials. It is settled that a private individual, acting alone, is not liable for damages under Section 1983. *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978). However, this Court has construed Section 1983 to encompass a conspiracy involving a private person and state officials if the private person was a "willful participant" in a conspiracy with agents or officials of the state. *Adickes v. Kress & Company,* 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

However, *Adickes* did not involve a judge. It involved policemen and the policeman's qualified immunity. Petitioner submits that the result should be different here because of the absolute nature of judicial immunity which derives from the underlying public policy.

VII.

A JUDGE IS NOT A "PERSON" UNDER SECTION 1983.

A judge acting within his jurisdiction is not a "person" as that word is used in Section 1983. It is submitted that this is the implication from this Court's holdings in

Pierson and *Stump*. This is the conclusion of Justice Douglas in his dissent in *Pierson*. 386 U.S. at 559.

The concept that judges are not "persons" under Section 1983 provides the rationale for the subject majority rule in the circuit courts. If the state actor is an immune judge, the private persons alleged to have conspired with the judge to deprive the complainant of his civil rights cannot be prosecuted under Section 1983. Such persons did not conspire with a "person" against whom a valid complaint could be stated under Section 1983.

VIII.

THE MAJORITY RULE IN THE CIRCUIT COURTS.

In a majority of the courts of appeals which have considered the issue here, the rule is and has been that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity. The rule has been followed by the Third Circuit in *Hazo v. Geltz,* 537 F.2d 747 (3rd Cir. 1976), *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975) and *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021; by the Fourth Circuit in *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); by the Sixth Circuit in *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. reh. den. 98 S.Ct. 1289; by the Seventh Circuit in *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975), *French v. Corrigan,* 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915, and *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969); and by the Ninth Circuit in *Haldane v.*

Chagnon, 345 F.2d 601 (9th Cir. 1965), *Sykes v. California Department of Motor Vehicles,* 497 F.2d 197 (9th Cir. 1974), and *Birley v. California,* 564 F.2d 849 (9th Cir. 1977).

In the Second Circuit, this majority rule was followed in *Russell v. Town of Mamoroneck,* 440 F. Supp. 607 (S.D.N.Y. 1977) and *Rhodes v. Laurino,* 444 F. Supp. 170 (E.D.N.Y. 1978).

The majority rule had been followed by the Fifth Circuit for a decade: *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978), cert. den. 99 S.Ct. 109; *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978).

IX.

THE MINORITY RULE IN THE CIRCUIT COURTS.

After this Court's decision in *Stump v. Sparkman, supra,* the subject issue of whether a claim can be stated against the co-conspirators was submitted on remand to the Seventh Circuit in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). As the dissent in the opinion below notes, the position of the Seventh Circuit is now unclear because of the highly fractionated en banc opinion in *Sparkman v. McFarland.*

The en banc opinion in *Sparkman v. McFarland* consists of a per curiam order and four concurring opinions. The Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the Section 1983 conspiracy claim against the private defendants after the state judge

was held to be immune. Two judges were of the opinion that the issue was not properly before the court. Three judges would allow Section 1983 suits even when the state actor is immune, but they would impose on the plaintiff the burden of a particularized pleading requirement.

Until the decision below on rehearing, the First Circuit stood alone as having squarely met the subject issue and having allowed the Section 1983 claim against the private conspirators. It was the exception among the circuit courts of appeals. *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976). In *Kermit* the court attempted to premise its holding on this Court's opinion in *United States v. Price,* 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966). The court reasoned that, immune or not, the state official provided the requisite state action. Anyone conspiring with that state official was therefore acting under color of state law. *Kermit,* 547 F.2d at 3.

Kermit does not even involve a state judge. *Kermit* involved a Section 1983 action brought against a bank, a construction corporation, and a court-appointed receiver. It was alleged that all of the defendants conspired to put the corporation into receivership and avoid paying a debt to the appellant. The court explained that the receiver should share a judge's judicial immunity. The court further held that the remaining private defendants could not "seek shelter of judicial immunity" even though the receiver was himself immune.

In regard to *United States v. Price, supra,* the only authority cited by *Kermit,* it is distinguishable from the instant case in several respects. It did not involve a judge

as an alleged co-conspirator. It did not involve the effect of judicial immunity on the liability of private co-conspirators under Section 1983. Instead, it involved 18 U.S.C.A. Section 242, a criminal statute. However, the Supreme Court refers to Section 1983 as the civil counterpart to said Section 242. And finally, *Price* involves outrageous and criminal conduct, clearly outside the scope of any acknowledged immunity, i.e. murder.

X.

EROSION OF THE DOCTRINE BY COLLATERAL ATTACK.

Like some of the opinions of the Seventh Circuit in *Sparkman v. McFarland,* but unlike the opinion of the First Circuit in *Kermit,* the majority opinion of the court of appeals below challenges the public policy behind the doctrine of judicial immunity.

The majority of the court of appeals below in the opinion on rehearing en banc would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages. It is submitted that the doctrine of judicial immunity, as described by this Court in its opinions in *Bradley, Pierson,* and *Stump* is intended to do more than merely immunize a judge from personal liability for money damages.

As enunciated in *Bradley,* the public policy requires that a judge be free to make decisions within his jurisdiction "without apprehension of personal consequences to himself". *Bradley,* 80 U.S. at 347. This Court did not restrict the phrase ". . . personal consequences . . ." to a judge's personal liability for damages.

Should the doctrine of judicial immunity be narrowly construed to prohibit only direct suit against a judge, yet allow a suit against the private co-conspirators in which the judge's motives and conduct would be in question? Petitioner submits that this Court has given a broader meaning to a judge's immunity. To re-quote a portion of the opinion in *Pierson,* the Court said:

> "His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation." *Pierson,* 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

Contrary to the narrow construction given the doctrine by the majority of the court below, the doctrine has been construed to bar more than liability for money damages. It bars the trial itself. The doctrine is not merely a defense to be raised by a judge at trial. According to Judge Learned Hand, this is justified, because

> ". . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949).

Again quoting from this Court's opinion in *Pierson*:

> "This immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the

> judges should be at liberty to exercise their function with independence and without fear of consequences.' " (citations omitted). *Pierson,* 386 U.S. at 554, 87 S.Ct. at 1218, 18 L.Ed. at 294.

The majority below has misconstrued the scope of the doctrine. They would have us believe that the harassment and intimidation to be avoided arises only out of a direct suit against a judge. But what of a suit against persons with whom the judge is alleged to have conspired?

XI.

BALANCING THE RELATIVE HARMS.

Those who would permit the prosecution of Section 1983 claims against private persons alleged to have conspired with judges reason that the judges' cloak of immunity should not shield guilty private co-conspirators. They would limit the scope of the doctrine to merely immunizing judges from personal liability for civil damages.

But as stated above, it appears that the doctrine, as developed in opinions of this Court, goes much further. The doctrine is intended to further the independence of the judiciary and protect judges from the intimidation and harassment growing out of judges' involvement or participation in litigation brought by disgruntled litigants.

It is recognized that the doctrine may shield a few dishonest judges from liability, but without the doctrine the independence of the judiciary is compromised. A balancing of conflicting public interests is required. It is submitted that the same balancing is applicable in considering the harms arising from the minority rule espoused by the majority in the court below.

An appropriate introduction to this concept of balancing conflicting public interests is a passage from Judge Learned Hand's opinion in *Gregoire v. Biddle, supra,* a portion of which is quoted earlier in this brief:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." *Gregoire,* 177 F.2d at 581.

Just as with a lawsuit against the judge, a lawsuit against his alleged co-conspirators will expose his motives, his honor and his integrity to the risks of the outcome. Not until the case is tried will it be known whether the allegations involving the judge's conduct were well founded or not.

What is the harm resulting from the majority rule? It is that the Respondents would be deprived of a remedy under federal law now provided by Section 1983 which is cumulative of remedies available to them under Texas law.

There are both criminal and civil remedies provided under Texas law for the complaint alleged by Respondents against Petitioner and the other alleged co-conspirators. In Texas, persons injured by the wrongful issuance of an injunction can sue the private "conspirators" for damages. As a matter of fact, that is exactly what the Respondents have done. They have now pending a suit seeking pecuniary damages in the 229th Judicial Dis-District Court in Duval County, Texas: Cause No. 9524, "Sidney A. Sparks, Trustee vs. Duval County Ranch Co., et al."

Also, Respondents have now pending a suit on the temporary injunction bond which Petitioner signed as surety. That suit is Cause No. 78-5045E in the 148th Judicial District Court of Nueces County, Texas.

There are criminal sanctions under Texas law for the kind of conduct alleged against the private individuals, involving bribery of a state official. Tex. Const. Art. XVI, Section 14; Tex. Penal Code, Section 36.02.

What are the harms from the minority rule espoused by the court below? Essentially, the minority rule per-

mits a collateral attack on the judge's action. It permits indirectly what the doctrine of judicial immunity prohibits. See the dissent below, 604 F.2d at 984; Petition Appendix, A28.

First, the judge's involvement is unavoidable in a Section 1983 claim brought against only the private co-conspirators. To establish the plaintiff's case against the defendants, the plaintiff must raise the issue of the judge's alleged participation, his actions and motives. He must show that the judge participated in the conspiracy to deprive him of his civil rights. He must prove the judge's participation in order to establish the requisite state action under Section 1983.

Even though the plaintiff cannot directly force the judge to participate by making him a defendant, the plaintiff can intimidate and harass the judge merely by being able to bring the lawsuit under Section 1983 against others involved in the state court case.

Second, if judicial immunity protects the judge but suit is permitted against his alleged co-conspirators, the judge becomes the primary and principal witness for the defense against all charges brought against the co-conspirators. The unprotected co-conspirator may have to build his case around the testimony and statements of the involved judge. For an effective defense, the plaintiffs and the alleged co-conspirators will be compelled to subject the judge to certain discovery procedures and pre-trial practices so that all facts and legal issues can be developed. The judge might be subjected to testifying in trial and being required to explain his conduct, motives and sincerity to another judge and jury. Such actions will require a judge to become involved in the

co-conspirator's defense and such actions will cause the judge to be diverted from his judicial position and responsibilities.

Is this what the public interest demands? Absolutely not. The public interest demands that a judge be free to act upon his own convictions without liability, fear or duty to answer to every person who feels aggrieved by the action or involvement of a judge. This Court stated in *Bradley v. Fisher, supra,* that "the public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." 80 U.S. at 349.

Third, the possibility of a judge being involved in the defense or prosecution of a private person on alleged conspiracy charges and the possibility of a judge being required to testify in such matters cause to be focused upon his judicial integrity. If there is anything the public demands and a judge should honor, it is his integrity as a judge and the effect of his integrity upon the judicial system as a whole. The public demands that a judge avoid evil or even the appearance of it. Yet, how can he maintain such integrity when he can still be made to submit to discovery, testify at trial and have his honor questioned. Unless the judge voluntarily enters the lawsuit as a defendant and waives his right of judicial immunity, he has no right to quetsion his accusers. He is not even assured the right to remain in the courtroom to hear the testimony of the witnesses. To defend himself, his name, his honor, and his integrity, the judge is forced to waive his immunity or to enter the case voluntarily as a defendant. If this occurs, then the very rationale

for the doctrine of judicial immunity has been undercut. As stated by this Court in *Bradley,* if a judge could be compelled to answer for his judicial acts, then his office and usefulness would be destroyed.

Fourth, public policy requires that the door to federal court not be opened wide to every aggrieved litigant in a state court proceeding. Anyone dissatisfied with the result of the litigation in a state court can allege a conspiracy sufficient to obtain federal court review of his claim. Every trial in a state court, criminal or civil, carries the potential for a claim that the judge and other participants in the proceeding acted in knowing concert to deny federal rights. In this way, the judicial system can be abused and the opportunities for continually involving the judge in such litigation can effectively prevent the judge from exercising his responsibilities as a judicial officer.

Fifth, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before getting involved in certain legal activities. This is very important since it can be presumed that if the action is unconstitutional, the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. If the seeking of aid from a judicial officer is ever challenged as a conspiracy, then the seeking of aid or assistance from the judiciary by private persons will be stifled and discouraged because of the unavailability of judicial immunity protection. This certainly runs in opposition to the public's interest and needs.

As indicated, there exists imperative public policy reasons for the majority rule in the circuit courts that pros-

ecution of a claim under Section 1983 should not be permitted against a private citizen when he or she is alleged to be a co-conspirator with a judge who is immune from such actions as a Section 1983 claim. Although this rule may result in protecting a guilty party from the federal claim, on balance the rule serves a greater purpose—the purpose served by the doctrine of judicial immunity. The minority rule will totally frustrate that purpose and the public interest.

To say that the consequences of allowing prosecution of suits against the alleged co-conspirators will be inconsequential is contradicted by the lower court's knowledge of the many "jailhouse lawyer" lawsuits and writs filed with the federal district courts and with the Fifth Circuit itself. The present burden of these suits was noted by the attorneys and by the members of the lower court during the panel argument and the argument on rehearing.

One need only consider the number of reported cases under Section 1983 involving judges of various jurisdictions, criminal and civil, judges who allegedly acted with improper motives and judges who have allegedly grievously erred. Disgruntled litigants have not been reluctant to try to take on their judges through the vehicle of a Section 1983 suit in federal court.

It is respectfully submitted that the majority rule is the proper resolution of the issue, and that this Court should clarify the rationale for the majority rule.

CONCLUSION

For the reasons set forth above, Petitioner Orville E. Dennis, prays that this Court reverse the judgment below insofar as it reverses the district court's dismissal of the complaint against Petitioner and the other defendants below, and that this Court affirm the judgment of the district court below dismissing the complaint against this Petitioner and the other defendants below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for the Petitioner have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to the counsel of record for the Respondents, as follows: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596 on the ____ day of May, 1980.

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